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IN THE

Supreme Court of the United States

October Term, 1941. No. 751

WILLIAM H. TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief In Support Thereof.

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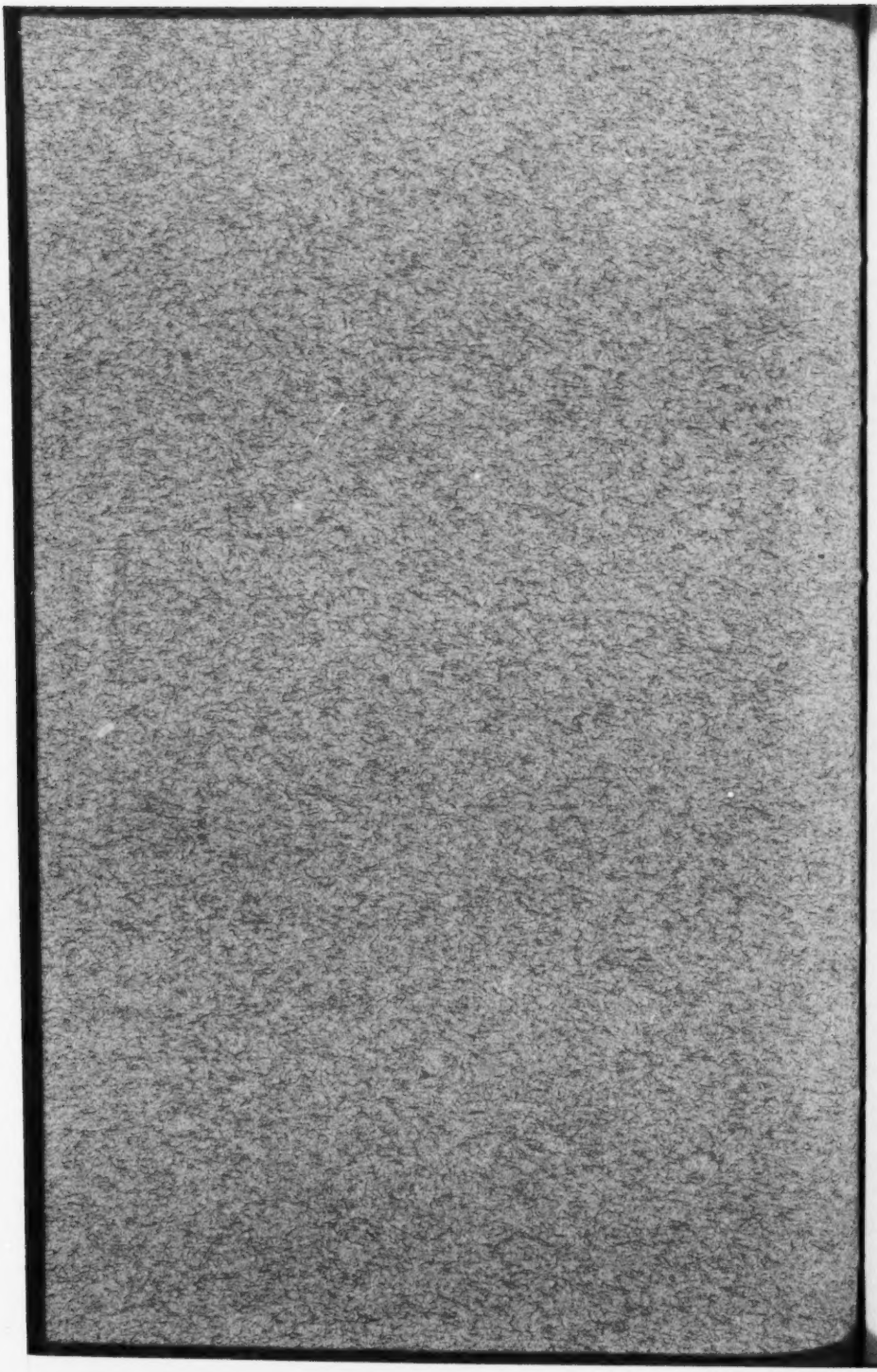

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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1941 No. .

William H. Taylor,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner above named prays that a writ of *certiorari* issue to review the judgment (R. 21) of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled matter August 22, 1941, reversing the order of the United States Board of Tax Appeals (R. 13) which reversed the respondent's determination and decided that there is no deficiency of $3,040.78 gift tax.

OPINIONS BELOW.

The memorandum opinion of the United States Board of Tax Appeals, entered February 1, 1940, is printed at Record, page 12, and is unreported.

The opinion of the Circuit Court of Appeals for the Third Circuit, filed August 22, 1941, is printed at Record, page 15, and is not yet reported.

JURISDICTION.

Final decision of the Circuit Court of Appeals for the Third Circuit was rendered August 22, 1941.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of Congress of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 938; 28 U.S.C.A., Sec. 347.

QUESTION PRESENTED.

In 1934 and 1935 the petitioner transferred property to trustees, to divide the same into four separate trusts and to pay the net income therefrom to each of four minor children of the tax-

payer's brother for their respective lives, granting to said trustees during the minority of each child the sole discretion to apply part or all of the income or accumulated income to the education and support of each child otherwise fully entitled to the income, and directing the trustees to accumulate the unexpended income for each such child and to pay the accumulations over to such child at the age of twenty-one. Under the foregoing facts, were the transfers by petitioner gifts of present interests, entitling him to four exclusions of $5,000 each pursuant to Section 504(b) of the Revenue Act of 1932, or, as contended by the Commissioner of Internal Revenue, were such transfers gifts of "future interests in property"?

STATUTES AND REGULATIONS INVOLVED.

Revenue Act of 1932, Chapter 209, 47 Stat. 169:

Sec. 501. Imposition of tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in Section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift

is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

Sec. 504. Net Gifts.

(a) General Definition. The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) Gifts Less than $5,000. In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purpose of subsection (a), be included in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 Ed.):

Art. 11. Future interests in property. No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other

interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT OF THE CASE.

During 1934 the petitioner executed an irrevocable trust and transferred to the trustees thereunder certain securities of the total value of $71,400 (R. 3, 10, 14). The foregoing trust instrument directed the trustees to divide the principal into four equal shares, each share to be held for the use and benefit of each of four children of the taxpayer's brother and the net income therefrom to be paid to each such child for his or her life (R. 3, 8, 15-16). The trust instrument further provided that the income "payable under the terms hereof" to any minor child should be accumulated by the trustees for each such child and paid over to him or her when he or she should attain the age of twenty-one years, "unless in the opinion of Trustees, in their sole discretion, such income or accumulated income should at any time during the minority of such child be needed for his or her proper education and support, in which event Trustees shall apply any part or all of such

income and/or accumulated income, as Trustees in their sole discretion may deem expedient, for the education and support of such child during his or her minority" (R. 3, 8, 15-16).

The trust instrument provided for distribution of the principal of the trust upon death of the life tenants either before or after their attaining the age of twenty-one (R. 8-9).

During 1935 the petitioner irrevocably transferred additional securities of a total value of $104,762.75 to the trustees under and in accordance with the terms of the aforesaid trust instrument (R. 4, 7, 10, 11).

The four beneficiaries of the trust were under twenty-one years of age during the years 1934 and 1935 (R. 4-5, 12, 14), and the value of each life interest given to such beneficiaries in each of the years 1934 and 1935 exceeded $5,000 (R. 5, 14-15).

In his Federal gift tax return for the year 1934 petitioner claimed four exclusions totalling $16,327.62 for the gifts made in that year (R. 3, 4); and in his Federal gift tax return for the year 1935 petitioner claimed four exclusions totalling $20,000 for the gifts made in such year (R. 3, 5, 7, 11). Respondent disallowed all of the exclusions thus claimed on the ground that the gifts were of future and not present interests, and he proposed deficiency gift tax liabilities of $252.18 and $3,040.87 for the years 1934 and 1935, respectively (R. 6-7, 11, 14).

The aforesaid deficiency of $252.18 for the year 1934 was paid on October 25, 1935 (R. 14). On August 10, 1937, petitioner filed his petition with the United States Board of Tax Appeals alleging that respondent erred in (1) not allowing four exclusions totalling $20,000 for the gifts made in 1935, (2) not allowing four exclusions totalling $16,327.62 for gifts made in 1934 and (3) not giving credit for the $252.18 overpayment of 1934 gift taxes against gift taxes due for the year 1935 (R. 1, 2-9). In the Stipulation of Facts filed with the Board of Tax Appeals the respondent conceded that he had erred in failing to allow at least one exclusion of $5,000 for each of the years 1934 and 1935 (R. 11-12).

In its decision entered on February 1, 1940, the Board of Tax Appeals determined that the petitioner is entitled to four exclusions of $5,000 each for the gifts made in 1935, and that there is no deficiency in gift tax for that year (R. 12-13). On Petition for Review filed by respondent herein, the Circuit Court of Appeals for the Third Circuit (Judge Maris dissenting) reversed the decision of the Board of Tax Appeals and held that petitioner herein is entitled to but one exclusion of $5,000 because the gifts made in 1935 were gifts of future interests within the purview of the decision of this Court in **United States v. Pelzer**, 312 U.S. 399 (1941) (R. 15-21).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that the gifts to the four minor beneficiaries were gifts of future interests in property, rather than of present interests in property, and that petitioner is not entitled to four exclusions for the year 1935 in the total amount of $20,000 under Section 504(b) of the Revenue Act of 1932.

2. In reversing the order of the Board of Tax Appeals determining that there is no deficiency in gift tax liability for the year 1935.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals, holding that the gifts in trust for minor beneficiaries, whereunder the trustees have discretion to apply income to the education and support of such beneficiaries and are directed to pay over the unexpended accumulated income to each beneficiary as he or she becomes twenty-one years of age, are gifts of future interests as to which petitioner is not entitled to the exclusions provided in Section 504(b) of the Revenue Act of 1932, is a decision in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, on the same matter, in the case of **Rheinstrom v. Commissioner**, 105 F. (2d) 642 (C.C.A. 8th, 1939).

2. The decision of the Circuit Court of Appeals, holding that the gifts in trust for minor beneficiaries are gifts of future interests as to which petitioner is not entitled to the exclusions provided in Section 504(b) of the Revenue Act of 1932, is inconsistent with and indistinguishable from the decision by the same Circuit Court of Appeals, on the same matter, in the case of **Commissioner v. Krebs**, 90 F. (2d) 880 (C.C.A. 3d, 1937).

3. The decision of the Circuit Court of Appeals, holding that the gifts in trust for minor beneficiaries are gifts of future interests as to which petitioner is not entitled to the exclusions provided in Section 504(b) of the Revenue Act of 1932, is in conflict with the decisions of the United States District Courts on the same matter, in:

Kinney v. Anglim, 1941 Prentice-Hall Federal Tax Service, Par. 62,961, 1941 Commerce Clearing House Inheritance, Estate and Gift Tax Service, Par. 10,100 (N.D. Cal. 1941), not yet officially reported;

Wieboldt v. United States, 1940 Prentice-Hall Federal Tax Service, Par. 62,729, 1940 Commerce Clearing House Federal Tax Service, Par. 9539 (N.D. Ill. 1940);

Noyes v. Hassett, 20 F. Supp. 31 (D. Mass. 1937).

4. The Circuit Court of Appeals, in holding that the gifts in trust for minor beneficiaries are gifts of future interests as to which petitioner is not entitled to the exclusions provided in Section 504(b) of the Revenue Act of 1932, has decided a federal question in a way probably in conflict with the decisions of this Court in **United States v. Pelzer**, 312 U.S. 399 (1941), and **Ryerson v. United States**, 312 U.S. 405 (1941).

5. The decision of the Circuit Court of Appeals, holding that the gifts in trust for minor beneficiaries are gifts of future interests as to which petitioner is not entitled to the exclusions provided in Section 504(b) of the Revenue Act of 1932, is a decision which involves an important question of federal law which is presently in a state of confusion and which has not been, but should be, settled by this Court.

WHEREFORE, petitioner prays that this Court may issue its writ of *certiorari* to review the decision of the court below.

WILLIAM H. TAYLOR,

BY

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BRIEF IN SUPPORT OF PETITION.

OUTLINE OF ARGUMENT.

This argument is confined to the question of the propriety of granting the present writ of *certiorari* and is based upon the numbered points above set forth under the heading Reasons for Granting the Writ.

ARGUMENT.

1. The decision here in question is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Rheinstrom v. Commissioner, 105 F. (2d) 642 (C.C.A. 8th, 1939).

The factual situation in Rheinstrom v. Commissioner, 105 F. (2d) 642 (C.C.A. 8th, 1939), is substantially the same as in the present case. There the settlor of the trust gave the trustees discretion to distribute income not only during minority, as in the present case, but also during the entire lives of the beneficiaries. As in the present case, the Commissioner argued that the provision for accumulation caused the gifts to be

of "future interests", but the Court held the gifts to be of present interests and said (p. 647):

> "The Commissioner directs attention to the fact that by the terms of the trust instrument the trustees are not required to pay to these three children their proportion of the income, but may accumulate it for their benefit, or, in the case of two of them, may pay it to them, their wives or children. It is true that the three children, other than Stewart, received no unconditional right to have their shares of the income paid to them by the trustees. It is equally true, however, that the taxpayer retained no interest in the shares of income which were assigned to them, and that, by the terms of the trust, each of them (or the wives and children of the two sons) were to have his or her share or it was to be accumulated for his or her benefit. The enjoyment of the benefits conferred upon three of her children by the taxpayer was conditional, **but it was to commence at once and not at some future date and was for their sole and immediate benefit.**" (Boldface supplied)

In arriving at its decision the Eighth Circuit Court of Appeals cited (p. 648) as supporting authority the decision by the Circuit Court of Appeals for the Third Circuit in **Commissioner v. Krebs**, 90 F. (2d) 880 (C.C.A. 3rd, 1937), which

decision is referred to in the dissenting opinion of the present case as "indistinguishable in principle" from the majority decision (R. 20).

It is clear that both the **Rheinstrom** decision and the decision here in question were concerned with the identical and sharply defined issue of whether a gift in trust, whereunder the trustee has discretion to apply income to the education and support of the beneficiary and is directed to hold the unexpended accumulated income for his benefit, is a gift of a future or of a present interest in property; and it is equally clear that the Circuit Courts of Appeals for the Third and Eighth Circuits rendered directly opposite decisions on such issue and that their decisions are in direct conflict with each other. This conflict can and should be resolved by this Court.

2. The decision here in question is inconsistent with and indistinguishable from the decision by the same Circuit Court of Appeals in Commissioner v. Krebs, 90 F. (2d) 880 (C.C.A. 3d, 1937).

In his dissenting opinion in the present case Judge Maris has stated (R. 19):

> "In my view the case is indistinguishable in principle from our case of Commissioner v. Krebs, 90 F. (2d) 880."

The majority opinion in the present case (R. 15-19) does not attempt to overrule or to distinguish the **Krebs** decision, nor does it even refer to that decision. That the two cases are indistinguishable is apparent from the facts of the **Krebs** case, where the trust income under each of three trusts was to be used by the trustee for the maintenance, support and education of the beneficiary until he attained the age of 25, at which time the accumulated income was to be paid to the beneficiary or his issue, appointees or distributees. The Commissioner had disallowed the gift tax exclusions on the ground that the gifts were of future interests in property, but the Court affirmed the decision of the Board of Tax Appeals that such gifts were of present interests and said (90 F. (2d) 881):

> ". . . tested by the nature of the gifts to the cestuis que trusts, the donor was entitled to the deduction. The donees were named, the respective values of the gifts to them were ascertainable, and they were given the use of the income and of the unexpended accumulated income without an intervening estate, even though physical possession was postponed."

In view of the fact that the **Krebs** decision has not been expressly or impliedly overruled, it would appear that that decision is still accepted

as the law by the Third Circuit Court of Appeals although it is entirely inconsistent with the majority opinion in the present case. The result is a state of confusion within the jurisdiction of the Third Circuit Court of Appeals which can and should be clarified by this Court.

3. The decision here in question is in conflict with the decisions of the United States District Courts within the first, seventh and ninth judicial circuits of the Courts of Appeals.

Within the first judicial circuit, the District Court of Massachusetts, in **Noyes v. Hassett**, 20 F. Supp. 31 (1937), held that transfers in trust whereunder the trustee was given discretion to accumulate any part of the income, instead of distributing it to the designated beneficiaries, were gifts of present interests and were "not future interests within the purview of the statute".

Within the seventh judicial circuit, the District Court for the Northern District of Illinois, in **Wieboldt v. United States**, unofficially reported in 1940 Prentice-Hall Federal Tax Service, Par. 62,729, and 1940 Commerce Clearing House Federal Tax Service, Par. 9539 (1940), held that:

> "Where a gift is made in trust and said trust is irrevocable with respect to the donor

> and said trust provides that the net income arising from the portion of the trust estate set apart for the benefit of each donee of the Settlor shall be accumulated and added to the principal of said portion of the trust estate so set apart until the happening of some contingency, such provision does not render said gift a gift of a future interest within the meaning of Section 504(b) of the Revenue Act of 1932."

Within the ninth judicial circuit, the District Court for the Northern District of California, in **Kinney v. Anglim,** 1941 Commerce Clearing House Inheritance, Estate and Gift Tax Service, Par. 10,100 (1941), held that there were gifts of present interests, entitling the donor to three gift tax exclusions of $5,000 each, where the income of a trust was to be paid to the mother of each beneficiary until such beneficiary reached 21 years of age.

In the absence of any decisions on similar facts by the Courts of Appeals in the foregoing judicial circuits, it would appear that these decisions of the United States District Courts represent the only applicable law within such judicial circuits. Ambiguous language in the decision by the Circuit Court of Appeals for the First Circuit in **Welch v. Paine,** 120 F. (2d) 141 (1941), cited for comparison in the majority decision in the pres-

ent case (R. 15), and indicated by the dissenting opinion to be "distinguishable on its facts" (R. 20), tends to confuse rather than to clarify the law within the first judicial circuit as to the meaning of present and future interests.

Therefore, the manifest inconsistency between the decision here in question and the aforementioned decisions of the District Courts within the first, seventh and ninth judicial circuits presents a state of confusion in the law which can and should be clarified by this Court.

4. The decision here in question is probably in conflict with the decisions of this Court in United States v. Pelzer, 312 U.S. 399 (1941), and Ryerson v. United States, 312 U.S. 405 (1941).

The majority opinion of the court below recognizes that in the present case the life estate "vests immediately and the accumulation is thereafter", whereas in the case of **United States v. Pelzer**, 312 U.S. 399 (1941), "some accumulation (10 years' worth) occurs before the vesting", but that opinion states that such difference does not constitute a distinction sufficient to require different results in the two cases (R. 16-17). This reasoning probably conflicts with that of this Court in **United States v. Pelzer**, where the immediate vesting of the beneficial interests in ascertained bene-

ficiaries was expressly decreed to be the vital factor. In that decision it was said that (312 U.S. 404):

> "Here the beneficiaries had no right to the present enjoyment of the corpus or of the income and unless they survive the ten-year period they will never receive any part of either. The 'use, possession, or enjoyment' of each donee is thus postponed to the happening of a future uncertain event. The gift thus involved the difficulties of determining the 'number of eventual donees and the value of their respective gifts' which it was the purpose of the statute to avoid."

In the present case the "use, possession and enjoyment" is not postponed to the happening of a future uncertain event, and there is no possible difficulty in determining the "number of eventual donees and the value of their respective gifts."

The decision in **Ryerson v. United States**, 312 U.S. 405, 409 (1941), likewise held the gifts there in question to be of future interests because "all those who might become entitled to the use and enjoyment of the trust, principal and income, were ascertainable only upon the happening of one or more uncertain future events . . . " The unmistakable reasons for the decisions in the **Ryerson** and **Pelzer** cases, although completely disregarded in the majority opinion of the deci-

sion here in question, are properly recognized in the dissenting opinion in the comment that (R. 19):

> "In neither case was there a definitely ascertained beneficiary of the income at the time of the gift or any provision for present distribution or use of that income."

It is submitted that the decisions of this Court in **United States v. Pelzer**, and **Ryerson v. United States, supra**, have been subjected to an erroneous interpretation never intended nor contemplated. The effect of such an interpretation will not be restricted to the third judicial circuit, but has and will create confusion and inconsistency throughout the entire country. The decisions of the Board of Tax Appeals in the present case (R. 12) and in **Charles W. Deeds**, 37 B.T.A. 293 (1938), and **Seymour H. Knox**, 36 B.T.A. 630 (1937), all recognize that gifts may be of present interests even though there may exist discretionary power in the trustee to accumulate so much of the income as is not necessary for the maintenance, education or support of the beneficiaries; and the Commissioner of Internal Revenue has not withdrawn his acquiescence in the two latter decisions, which are respectively reported at 1938—1 Cum. Bull. pages 8 and 17.

Accordingly, it is submitted that this Court can and should dispose of the doubts and confusion

created by the erroneous interpretation given by the present decision to the decisions of this Court in the **Pelzer** and **Ryerson** cases, and that this Court can and should resolve the probable conflict that has resulted.

5. The decision here in question involves an important question of federal law which is presently in a state of confusion and which has not been, but should be, settled by this Court.

It is evident from the foregoing discussion that the present decision is in conflict with other decisions of the Circuit Courts of Appeals, the United States District Courts and the United States Board of Tax Appeals. Moreover, the Commissioner's present view as represented in the present decision is in direct conflict with his acquiescence in the contrary decisions of the Board of Tax Appeals in **Charles W. Deeds** and **Seymour H. Knox, supra.**

This state of confusion can be traced back to the time at which the Commissioner attempted to reduce the number of gift tax exclusions under Section 504(b) of the Revenue Act of 1932 by contending that, in the case of a gift in trust, there was only a single gift to the trustee rather than multiple gifts to the more numerous beneficiaries of the trust. At this time disallowance of exclu-

sions because the gifts were of future interests was not asserted in all of the cases in litigation because, apparently, the Commissioner was satisfied to rely on the equally efficacious issue based on a single gift to the trustee.

After protracted litigation in the lower courts, this Court held that the donees of the gifts were the beneficiaries and that gift tax exclusions were allowable as to each beneficiary. **Helvering v. Hutchings**, 312 U.S. 393 (1941); **United States v. Pelzer** and **Ryerson v. United States, supra.** However, the further ground for decision in the **Pelzer** and **Ryerson** cases, to the effect that the gift tax exclusions were not allowable since in those cases the gifts were of future interests, has resulted in further efforts by the Commissioner to disallow as exclusions any gifts in trust under which the income is not expressly required to be paid and distributed immediately upon its receipt.

The changed attitude of the Commissioner is best illustrated by this Court's decision in **Helvering v. Hutchings, supra.** The facts stated in the opinion of the Board of Tax Appeals, 40 B.T.A. 27 (1939), indicate that the trustee had discretion to distribute or accumulate the income for the benefit of each of seven children of the grantor. The Commissioner did not raise the issue of "future interest" before either the Board of Tax Appeals or the Circuit Court of Appeals (111 F.

(2d) 229 (C.C.A. 5th, 1940)), but that issue was raised before this Court for the first time and, since the question had not been presented in the petition for *certiorari,* it was not considered. This Court said (312 U.S. 398):

> "Nor do we consider whether the gifts to the beneficiaries here are of future interests which are excepted from the benefit of the $5,000 deduction allowed by §504(b). That question is not presented by the petition for certiorari. But our judgment will be without prejudice to consideration of that question by the Board of Tax Appeals upon the remand to it if, under the rules of procedure governing proceedings before the Board, the Commissioner is free to present the question there."

It is believed that the issue which was not properly before this Court in the **Hutchings** case is, for the first time, clearly and properly presented in the present case. Accordingly, it is submitted that the confusion presently existing on this important federal question among the lower courts, and also among the administrative agencies concerned with the enforcement of the internal revenue laws, can and should be clarified and settled by this Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of *certiorari* should be granted.

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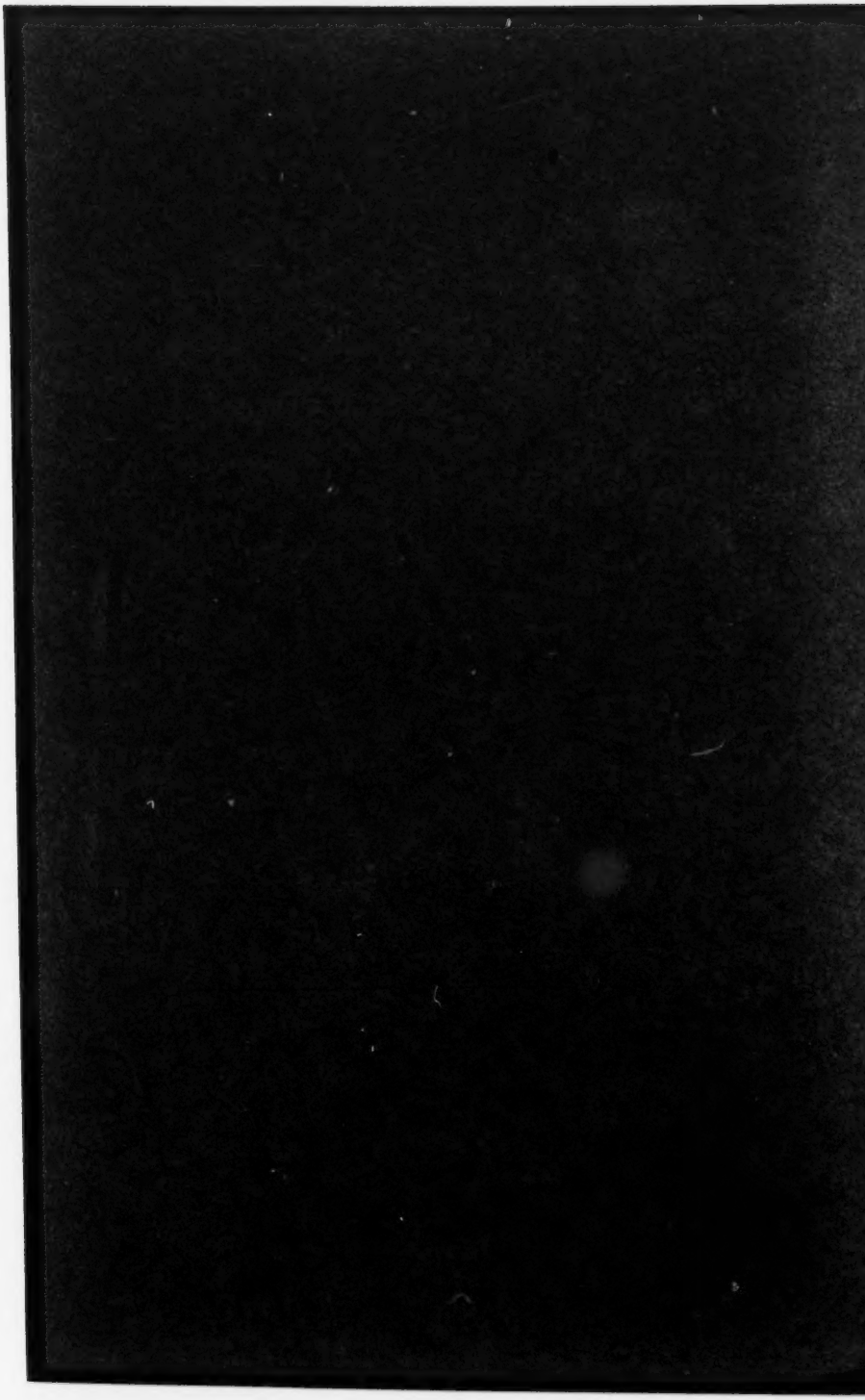

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 751

WILLIAM H. TAYLOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 12) is not reported. The opinions of the Circuit Court of Appeals (R. 15–20) are reported in 122 F. (2d) 714.

JURISDICTION

This case involves gift taxes for the year 1935 in the amount of $3,040.78 (R. 12). The judgment of the Circuit Court of Appeals was entered August 22, 1941 (R. 21). The petition for a writ of

certiorari was filed November 21, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer transferred property in trust, directing the trustee to accumulate the income therefrom during the minority of the four beneficiaries, but authorizing him to apply such of the income for their support and education as he might deem expedient. Did the taxpayer thereby make "gifts of future interests in property" under Section 504 (b) of the Revenue Act of 1932, or were there four gifts of present interests, warranting four exclusions of $5,000 each?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a

transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

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(U. S. C., Title 26, Sec. 550.)

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

(U. S. C., Title 26, Sec. 553.)

Treasury Regulations 79 (1936 Ed.):

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commerce in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

During 1934, the taxpayer executed an instrument of trust and transferred certain securities to the trustee thereunder. The trustee was directed to divide the principal into four equal shares, one for each of the four children of the taxpayer's brother. The income was to be accumulated for each beneficiary until he or she reached the age of 21. Each child, upon attaining the age of 21, was to receive the income from his or her portion for life. The trustee was authorized to apply any part of the income or accumulated income for the education or support of any of the children during minority if he deemed it expedient (R. 3–4).

During the year 1935, the taxpayer transferred additional securities to the trust, and it is this gift which is involved in the instant proceeding (R. 11). When these additional securities were conveyed, the four beneficiaries of the trust were all under 21 (R. 12).

In his gift tax returns the taxpayer excluded the sum of $5,000 for each beneficiary of the trust. The Commissioner asserted a deficiency on the ground that no exclusions were allowable (R. 11).

The Board of Tax Appeals sustained the taxpayer's contention, and allowed four exclusions (R. 12–13). The Circuit Court of Appeals reversed [1] (R. 21).

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[1] In the course of the proceedings before the Board of Tax Appeals the Commissioner conceded that one exclusion was

ARGUMENT

1. Petitioner alleges conflicts with *Rheinstrom* v. *Commissioner,* 105 F. (2d) 642 (C. C. A. 8th), and *Commissioner* v. *Krebs,* 90 F. (2d) 880 (C. C. A. 3d). But both those cases were decided prior to the decisions of this Court in *Helvering* v. *Hutchings,* 312 U. S. 393; *United States* v. *Pelzer,* 312 U. S. 399, and *Ryerson* v. *United States,* 312 U. S. 405, which finally established the rules to be applied in cases of this type. And the *Rheinstrom* decision was one of those constituting the conflict which led to the granting of certiorari in those cases. 312 U. S. at 395. There is therefore no present basis for certiorari.

The court below correctly relied upon this Court's decision in the *Pelzer* case where, as here, the income was to be accumulated for a period of years. The discretion lodged in the trustee to pay or withhold income leaves uncertain the amount of income that the beneficiaries will receive during the year, and consequently the use, possession and enjoyment is postponed to the happening of a future uncertain event, namely, the exercise of the trustee's discretion. The court below was right in

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allowable on the theory that the donee of the gift was the trustee (R. 11–12). This position was held incorrect in *Helvering* v. *Hutchings,* 312 U. S. 393. In the Circuit Court of Appeals, the Commissioner changed his position and argued that the gifts were all future interests, but agreed that one exclusion should be allowed in accordance with the concession made before the Board (R. 19).

holding that the gifts were "future interests" as that term was used in the Act and defined by this Court.

2. Petitioner cites three decisions of District Courts arising in three different circuits to demonstrate that confusion exists respecting the application of the term "future interests" to the facts of individual cases. *Noyes* v. *Hassett,* 20 F. Supp. 31 (Mass.); *Wieboldt* v. *United States,* decided by the Northern District of Illinois June 8, 1940, not officially reported but found in 1940 C. C. H., Vol. 4, par. 9539; *Kinney* v. *Anglim,* decided by the Northern District of California September 18, 1941, not officially reported but found in C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10,100. However, even if the decisions in these cases do conflict with the decision below, which is not certain, they still do not indicate the existence of conflicting rules among the circuits, and there is convincing evidence to the contrary. *Noyes* v. *Hassett* arose in the First Circuit, where the Circuit Court of Appeals has decided two cases since this Court's decisions in the *Hutchings, Pelzer,* and *Ryerson* cases, and both are in accord with the rules established therein. *Welch* v. *Paine,* 120 F. (2d) 141; *Commissioner* v. *Brandegee,* 123 F. (2d) 58. In the latter case, the court cited with approval the decision below in the instant case. *Wieboldt* v. *United States, supra,*

is now pending on appeal before the Circuit Court of Appeals for the Seventh Circuit,[2] which, in *Commissioner* v. *Glos* (*Gloss*), decided November 14, 1941, not yet officially reported but found in C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10,106, cited with approval the decision of the court below herein. *Kinney* v. *Anglim supra,* arose in the Ninth Circuit, where the Circuit Court of Appeals on October 23, 1941, decided *Commissioner* v. *Boeing* (not yet officially reported but found in C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10,104), and cited with approval the decision below in the instant case.

There is no present confusion, and since the decisions of this Court in the *Hutching, Pelzer,* and *Ryerson* cases, the circuit courts of appeals have followed a consistent course of decision on these questions. See *Helvering* v. *Blair,* 121 F. (2d) 945 (C. C. A. 2d); *Commissioner* v. *Barbour,* 121 F. (2d) 728 (C. C. A. 3d); *Welch* v. *Paine,* 120 F. (2d) 141 (C. C. A. 1st); *Hopkins* v. *Magruder,* 122 F. (2d) 693 (C. C. A. 4th); *Commissioner* v. *Glos* (*Gloss*) (C. C. A. 7th), *supra; Commissioner* v. *Boeing* (C. C. A. 9th), *supra; Commissioner* v. *Brandegee* (C. C. A. 1st), *supra.*

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[2] Also pending before that court is a companion case, *Wieboldt* v. *United States*, decided the same day, not officially reported but found in 1940 C. C. H., Vol. 4, par. 9538.

CONCLUSION

The decision below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

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